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No. 93-1823

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY MEMORANDUM

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14 pp

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Reply to Respondents' Statement of Reasons for Denying the Writ	1
I. The Student Achievement Standard Imposed by the Lower Courts Does Not Put the Plaintiffs in the Place They Would Have Been Absent Past *De Jure* Segregation; the Provision of Equal Educational Resources Accomplishes That Goal. Rather, the Lower Courts' Outcome-based Standard Imposes a New, Extra-Constitutional Requirement for Unitary Status	2
II. Respondents Expressly Urged the Court of Appeals to Reject the State's Request for Partial Unitary Status on the Basis That Student Achievement Had Not Risen Sufficiently; the Court of Appeals Panel Expressly Adopted the Argument, Ruling That Parties Seeking Unitary Status Must Prove That Student Achievement Has Been Improved	5
III. The Student Achievement Issue Presented for Review is Not "Fact-Bound" Because Neither of the Courts Below Made the Kind of "Careful Factfinding" Necessary for Resolving *Freeman* Issues — Rather, For the First Time on Appeal, the Court of Appeals Erroneously Engrafted an Improper Student Achievement Hurdle onto the Legal Standard for Unitary Status	8

IV. This Matter Requires This Court's Review Because the Lower Courts Improperly Interpreted the Fourteenth Amendment to Permit Imposition of Desegregation-Funded Salary Increases for all Non-Instructional KCMSD Personnel Where There Were No Findings That the Levels of Those Salaries Violated Anyone's Equal Protection Rights or Were the Product of *De Jure* Discrimination on the Part of the State or Local School Board 9

Conclusion 10

TABLE OF AUTHORITIES

Page(s)

Cases:

Board of Education v. Dowell, 498 U.S. 237 (1991) .....*passim*

Board of Education v. Rowley, 458 U.S. 198 (1982) 4

Freeman v. Pitts, 112 S.Ct. 1430 (1992) .....*passim*

Liddell v. Board of Education, No. 72-1OOC(6) Slip. op. (E.D. Mo., May 2, 1994) 2

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PETITIONERS' REPLY MEMORANDUM

REPLY TO RESPONDENTS' STATEMENT OF REASONS FOR DENYING THE WRIT

Across the nation, dozens of desegregation cases are moving into the final stages of their remedy phases. The issue presented in all these cases, as here, is the appropriate legal standard for determining when the defendants' obligations end. This Court addressed this issue in *Freeman v. Pitts*, 112 S.Ct. 1430 (1992) and *Board of Educ. v. Dowell*, 498 U.S. 237 (1991). This pure legal question is the issue about which the parties to the Kansas City desegregation case — now in its seventeenth year after the expenditure of over $1.3 billion — are in

sharp disagreement.[1] The respondents claim, and the lower courts agreed, that a federal court may require, as a prerequisite for unitary status, that defendants show not only that they have provided equal educational resources, but also that students in the district are attaining higher levels of educational achievement. App. A-21.

That standard is inconsistent with *Dowell*, *Freeman*, and their predecessors, and should be flatly rejected by this Court. Absent this Court's repudiation of that requirement, lower courts in other desegregation cases could be forced to expand greatly the contours of already-existing remedies.[2] This would effectively transform those temporary remedies into permanent fixtures.

I. The Student Achievement Standard Imposed By The Lower Courts Does Not Put The Plaintiffs In The Place They Would Have Been Absent Past *De Jure* Segregation; The Provision Of Equal Educational Resources Accomplishes That Goal. Rather, The Lower Courts' Outcome-Based Standard Imposes A New, Extra-Constitutional Requirement For Unitary Status.

Respondents, particularly the KCMSD, attempt to justify the Eighth Circuit's extra-constitutional student outcome requirement as simply

[1] Contrary to respondents' apparent belief, the State has no intention of relitigating decades-old liability issues. Respondents, particularly the plaintiffs below, understandably prefer to dwell on the past rather than the future course of this temporary remedy. To that end they devote nearly half of their Statement of the Case to an irrelevant history of *de jure* segregation in Missouri, which ended decades ago. Jenkins Br. at 4-12. Petitioners agree that segregation by law is a sad chapter of Missouri's past. The question now, however, is whether this Court should reverse the lower courts' imposition of a constitutionally erroneous, impracticable and unachievable remedy for the future.

[2] The result of the panel's ruling is demonstrated by a recent order of the District Court supervising the St. Louis desegregation remedy. In that case, which itself has run 22 years at a cost exceeding $1.65 billion, the District Court adopted the Eighth Circuit's erroneous standard, finding that before unitary status could be declared, defendants must show "improvement in academic achievement by black students." Moreover, the court ordered the defendant school district to submit "specific, measurable outcome-based goals addressing: (a) increasing scores on standardized tests. . . ." *Liddell v. Board of Education*, No. 72-100C(6), slip op. at 2-3 (E.D. Mo. May 2, 1994).

a matter of "put[ting] the victims of unconstitutional conduct as nearly as reasonably possible in the position they would have been but for the constitutional violation." Resp. Dist. Br. at 19. But while respondents have correctly summarized the purpose of a desegregation remedy, the lower courts' student outcome standard defies it. This is precisely why review is required here.

Respondents contend that putting a KCMSD student in the position he would have occupied absent past constitutional violations requires the State to provide extraordinary desegregation funding until "every school [in] . . . the District has reached the national norm" in student achievement tests. App. A-62 (Testimony of KCMSD superintendent). Quite apart from the unresolvable issue of how one can know the student would have achieved this level absent unconstitutional conduct that likely ended before he was even born, the standard is simply wrong as a matter of Fourteenth Amendment law. Putting that student in the place he would have occupied absent unconstitutional discrimination means providing equal educational facilities and programs — which respondents concede the State has done.[3] It does not require guaranteeing the student a result in the 50th percentile on a standardized achievement test. The lower courts were simply wrong in permitting consideration of that criterion, much less in requiring its attainment.

Moreover, the outcome-based standard that respondents attempt to justify as a "reaffirmation of well-settled" constitutional law (Resp. Dist. Br. at 18) is in fact just the opposite — it flatly contradicts this Court's unitary status standards in at least two respects. First, the panel's student achievement standard contravenes the principle, emphasized in both *Freeman* and *Dowell*, that desegregation remedies are *temporary* deviations from the norm of parental and neighborhood control over schools. *Freeman*, 112 S.Ct. at 1448; *Dowell*, 498 U.S. at

[3] Respondents attempt to minimize the District Court's finding that the remedies have already "provide[d] the KCMSD with facilities and opportunities not available anywhere else in the country." App. A-115. However, they could not contravene the State's evidence at trial that the *Milliken II* facilities and programs have been fully and properly implemented in KCMSD since at least 1988 and that the KCMSD " 'exceeds what's available in all the suburban school districts in almost every area of classification' " examined by the Department of Elementary and Secondary Education. *See* discussion at App. A-61 (Beam, J., dissenting from denial of reh'g en banc).

248. Respondents themselves concede that an outcome-based standard likely will prolong this case for decades, if not longer. At trial the District called for an indefinite remedy based on the speculative assertion that student achievement might someday reach an arbitrarily selected level. The District's former Assistant Superintendent for Instruction, Art Rainwater, testified that even if it took 100 years for KCMSD to attain respondents' arbitrarily selected achievement levels, the remedy must continue "regardless of how many years" it takes. (Full colloquy at App. A-62). Similarly, the Superintendent, Dr. Walter Marks, testified that the remedy would not be complete until "every school [in] . . . the District [has reached] the national norm, the 50th percentile" in student achievement tests. *Id.* This is hardly the "temporary" type of remedy envisioned by this Court in *Freeman* and *Dowell.*

Moreover, the legal standard injected by the panel defies *Freeman* and *Dowell* in another crucial respect. *Freeman* limited a desegregation defendant's obligations to those matters over which it is able to exercise control. 112 S.Ct. at 1445. Referring to conditions caused by demographic shifts outside the control of the defendants, this Court stated, in language strikingly applicable here:

> It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. *To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once de jure segregated.*

112 S.Ct. at 1448 (emphasis added).

Given this Court's recognition that "a myriad of factors . . . might affect a particular student's ability to assimilate information in the classroom," *Board of Education v. Rowley*, 458 U.S. 176, 198 (1982), the Eighth Circuit's rule requiring the State and District to improve student test scores to national norms (or some other arbitrary level) imposes a requirement that simply may not be attainable. Desegregation defendants are to be held responsible only for matters within their control and only to the extent they can effect practicable remediation. 112 S.Ct. at 1445.

II. Respondents Expressly Urged The Court Of Appeals To Reject The State's Request For Partial Unitary Status On The Basis That Student Achievement Had Not Risen Sufficiently; The Court Of Appeals Panel Expressly Adopted The Argument, Ruling That Parties Seeking Unitary Status Must Prove That Student Achievement Has Been Improved.

Rather than confront the panel's irreconcilable deviation from *Freeman* and *Dowell*, respondents seek to disguise the lower courts' erroneous rulings, claiming that they did not really engraft a student achievement test onto the legal standard set out in the Court's two decisions. They so argue despite the fact that in their effort to defend the District Court's ruling they specifically argued to the Eighth Circuit that unitary status was inappropriate because of lagging "educational outcomes." Dist. App. Br. at 26.[4] Moreover, eight of the eleven judges of the Eighth Circuit expressly agreed that the panel decision adopted a student achievement standard for unitary status.

First, the five Eighth Circuit judges dissenting from the denial of rehearing en banc unmistakably understood that the panel and the lower court opinions were premised on a standard requiring enhanced student achievement. Led by Judge Beam, they wrote:

> The appellees . . . contend that the panel did not rely on a student achievement standard in affirming the district court. The words "achievement test results" or even "test results," so say the appellees, "are nowhere to be found in the panel decision." This argument, in my view, is disingenuous. The panel affirmed the district court. The district court obviously relied upon test scores below the national norm as the basis for its ruling. The district court, by its own statement, "[h]as gone to great lengths to provide the KCMSD with facilities and opportunities *not available* anywhere else in the country." * * * The only factor the district court saw standing in the way of unitary status for the educational program was continued below average academic performance. Indeed, there is no other evidence in the record to support a conclusion that the educational enhancement (*Milliken II*) program of the KCMSD is wanting.

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[4] References to the parties' briefs on appeal before the Eighth Circuit are designated as "___App. Br."

A-60-61 (Beam, J., dissenting) (citations omitted) (emphasis in original).

So too, the three judges concurring in the denial of rehearing en banc (including the author of the panel opinion and another panel member) conceded the panel's application of a test results standard in acknowledging that "[w]hen we deal with student achievement in a quality of education program in the context of relieving a school district of court supervision, *test results must be considered.*"[5] A-48 (Gibson, J., concurring) (emphasis added). Thus, eight of the 11 en banc judges of the court of appeals viewed the panel's decision as engrafting a student achievement hurdle onto the *Dowell* and *Freeman* standard.

This is hardly surprising for the respondents urged this very position both before the District Court and in the Eighth Circuit. On appeal, the District respondents made no less than 21 separate references to student achievement in their brief. Dist. App. Br. at 2, 5, 6, 23-26. The District argued, for example, that "test scores . . . remain below national norms in most instances." Dist. App. Br. at 25. The District relied heavily on the trial testimony of District witnesses that there were "more reading, math and language arts scores above national norms in 1991 than in 1985 but most [were] still below [national norms]." Dist. App. Br. at 6, n.5. The District also faulted the State for not alleging that "*deficits in educational outcomes* due to segregation have been eliminated in the KCMSD." *Id.* at 26 (emphasis added). And, in opposing the State's petition for rehearing, respondents-plaintiffs argued that, "[f]or the State to receive a declaration of partial unitary status on the educational components . . . it must show that achievement overall has increased." Pltfs. Resp. to Pet. for Reh'g at 6. In unmistakable terms, therefore, respondents sought to defend the District Court's decision on the basis that "educational outcomes" had not risen enough to warrant a declaration of unitary status — the same holding they now claim the panel failed to reach.

[5] Having acknowledged the application of a test score standard, the concurring judges inexplicably and erroneously concluded, "Nothing in this court's opinion, the district court's opinion, or the testimony of KCMSD's witnesses indicates that test results were the *only* criteria used in denying the State's claim that its obligation for the quality education programs should be ended." A-48 (emphasis added). Even this statement, however, acknowledges test results were a basis for the district court's denial of the State's unitary status request. Because the Fourteenth Amendment requires only the provision of equal opportunities, *any* reliance on test scores is improper.

In the same vein, the District Court, as the en banc dissenters observed, made pointed reference to student achievement in its decision of April 16, 1993, from which the panel attempted to assemble a suitable set of findings to support its ruling. A-59-60. For example, in its April 16 order, the District Court stated that the KCMSD magnet programs could not be accorded partial unitary status because

> [while] the evidence is clear that there has been a trend of improvement in academic achievement in the KCMSD . . . the Court is not satisfied that the District has reached anywhere close to its maximum potential because the District is still at or below national norms at many grade levels.

A-131.

Thus, in purporting to apply the *Dowell* and *Freeman* standards to the KCMSD magnet program, the District Court held that simply because test scores were below national norms, more could be done, and therefore, partial unitary status could not be declared.[6]

Similarly, the District Court's statements of its goals for the *Milliken II* components — made at the May 1992 hearing that led to the trial court's implicit rejection of the State's unitary status request — also evidence the District Court's erroneous reliance on a student achievement standard. The trial court stated that " 'all these [*Milliken II*] matters were elements to be used to try to integrate the [KCMSD] .... That's the goal. *And a high standard of quality education.*' " App. A-11 (quoting District Court). Thus, although the District Court failed in its June 17, 1992 order to make the necessary findings when it denied the State's partial unitary status request as to the *Milliken II* programs, its later orders make clear that it misapprehended the *Freeman* stan-

[6] The District Court credited but chose not to rely upon expert evidence presented by the State that other factors, outside the educational experience, made the attainment of national norms in KCMSD most unlikely. A-132. Thus, the trial judge, in ordering defendants to produce increased achievement in the KCMSD magnet program, as he did in the *Milliken II* components at issue here, committed the taxpayers of Missouri and Kansas City to a potentially perpetual remedy, in clear defiance of *Dowell's* and *Freeman's* mandate that desegregation remedies are to be temporary measures, terminated when they have achieved that which is practicable. 498 U.S. at 247-48; 112 S.Ct. at 1446.

dard to require improved student achievement, which it plainly does not.[7]

Thus, as before the Eighth Circuit, respondents remain "disingenuous" in insisting that the lower courts did not premise their denial of the State's request for partial unitary status on a student achievement standard. A-60 (Beam, J., dissenting from denial of reh'g en banc). Eight of the eleven Eighth Circuit judges so read the panel's opinion, and respondents expressly urged the panel to rule on that basis. The District Court's later orders, used by the panel as a substitute for specific findings in the order at issue here, also evidence the trial court's use of a student achievement standard as to both the *Milliken II* components and other portions of the remedy. The lower courts plainly injected an impractical and erroneous student achievement obstacle into the accepted unitary status standard. This Court should review that flawed interpretation of the Fourteenth Amendment.

III. The Student Achievement Issue Presented For Review Is Not "Fact-Bound" Because Neither Of The Courts Below Made The Kind Of "Careful Factfinding" Necessary For Resolving *Freeman* Issues—Rather, For The First Time On Appeal, The Court of Appeals Erroneously Engrafted An Improper Student Achievement Hurdle Onto The Legal Standard For Unitary Status.

Respondents are also incorrect in arguing that the Eighth Circuit's erroneous student achievement standard is not worthy of Supreme Court review because it is the product of a complex record and unappealed and detailed factual findings. Their contention ignores the District Court's failure to make any findings whatsoever in first rejecting the State's request for partial unitary status. Moreover, it fundamentally misconstrues the State's argument. The State does not seek review of any factual finding, nor does it ask this Court to declare partial unitary status. Petitioners seek only the correction of the erroneous legal standard applied below. Moreover, respondents' corollary argument, in which they incongruously contend that the State

[7] As noted earlier, *supra* note 2, the District Court overseeing the St. Louis desegregation case also interprets the panel decision as imposing a student achievement requirement.

never requested partial unitary status below, fails to explain what could have triggered the supposed findings upon which they so heavily rely.[8]

Respondents are flatly wrong in portraying the legal issue here as one cloaked in complex and detailed findings. As the panel acknowledged, the District Court made no express findings at all, either detailed or not. A-10. The District conceded this below, admitting that what the District Court's orders "do not do — and need not do — is detail the numerous obvious reasons for the district court to reject the State's . . . *Freeman* argument." Dist. App. Br. at 31-32. Instead, in its June 17, 1992, order denying the State's request for partial unitary status as to the *Milliken II* components, the District Court simply approved a $54 million budget for those programs. In a July 30, 1993, order, the District Court went barely further, concluding only that "the Court finds that the State's arguments that the [*Milliken II*] components have attained unitary status are unpersuasive." A-112. This hardly constitutes a factual finding, much less the "careful factfinding and detailed articulation of findings" that the panel itself properly read *Dowell v. Board of Education* and *Freeman* to require. A-20. Thus, respondents are incorrect when they portray the legal issues here as factual questions undeserving of this Court's attention.

IV. This Matter Requires This Court's Review Because The Lower Courts Improperly Interpreted The Fourteenth Amendment To Permit Imposition of Desegregation-Funded Salary Increases For All Non-Instructional KCMSD Personnel Where There Were No Findings That The Levels Of Those Salaries Violated Anyone's Equal Protection Rights Or Were The Product Of *De Jure* Discrimination On The Part Of The State Or Local School Board.

Respondents return to a familiar refrain in insisting that the lower courts' orders imposing desegregation-funded salary increases for all non-instructional personnel within the KCMSD involve yet another

[8] This is a novel assertion. Respondent District told the Eighth Circuit that, "[a]nticipating the State's case concerning *Freeman v. Pitts*, [it] also presented extensive evidence of the *Milliken II* programs." District App. Br. at 5. Apparently at the trial and appellate stages respondent District plainly understood the State to have requested partial unitary status under *Freeman*.

factually-bound issue. They urge this despite the fact that no court has ever found that (1) salaries for non-instructional personnel were depressed as a result of the State's or the District's past constitutional violations or, (2) if it existed, this condition violated plaintiffs' constitutional rights.

Petitioners ask this Court to review only the legal question whether the salary increases for non-instructional personnel constitute an inappropriate upgrade of school district resources, unrelated to desegregation, which do not "advance the ultimate objective of alleviating the initial constitutional violation." *Freeman*, 112 S.Ct. at 1445.

CONCLUSION

This Court should grant the writ of certiorari and review the important legal issues presented in the petition.

Respectfully submitted,

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